CFIUS Gone Wild: The Need for Accountability Measures to Protect Foreign Direct Investment in the United States

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TABLE OF CONTENTS

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INTRODUCTION

Throughout its existence, the Committee on Foreign Investment in the United States (CFIUS) has largely acted in secrecy and without traditional measures of accountability present in administrative law such as strong judicial review, strict congressional mandate, and requirements to explain its actions. Under the guise of national security, the Committee has become a gatekeeper for who can and cannot invest in the United States economy through review of foreign mergers, acquisitions, and takeovers of American corporate entities. What started as a small information-gathering taskforce in the 1970s under President Ford has grown into the primary tool with which we regulate foreign direct investment (FDI) in the United States.

CFIUS acts largely through a combination of voluntary and mandatory filings in which foreign investors submit proposed mergers, acquisitions, and takeovers for determinations of whether the United States has national security concerns with the transaction. The Committee reviews the transaction, potentially initiates an investigation, engages in mitigation negotiations with the corporate entities involved, and makes final recommendations to the President on whether to block the transaction or allow the transaction to proceed. In practice, recommendations typically only make it to the President if at least some of the Committee believes that the transaction poses national security concerns. If there are no such concerns, the Committee typically grants permission to the foreign investor to proceed with the transaction. The Committee largely acts proactively before transactions are finalized, but they can also review completed transactions and recommend that the President undo them if they present national security concerns.

CFIUS is enormously influential in FDI in the United States because it largely controls who can join the party. While it only has jurisdiction over transactions that concern national security, the scope of that definition has widened significantly with recent legislation. The review process is complex and exhaustive, which creates an obstacle that can deter foreign investors from even attempting to engage in a transaction.[1] The President has only blocked five transactions since the creation of CFIUS. However, CFIUS's reach must be judged not by looking at the number of blocked transactions but by the number of CFIUS filings and declarations that have been withdrawn due to negative reactions of CFIUS members and failed mitigation efforts. In 2023, there were 233 written notices of transactions filed with CFIUS and fifty-seven of these notices were withdrawn.[2] Fourteen of those that were withdrawn were immediately abandoned for commercial reasons or after CFIUS and the parties were unable to reach a mitigation agreement.[3]

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1. *See* Paul Connell & Tian Huang, *An Empirical Analysis of CFIUS: Examining Foreign Investment Regulation in the United States*, 39 YALE J. INT'L L. 131, 133 (2014).

2. 2023 CFIUS Ann. Rep. to Cong. at 14.

3. *Id.*

The need for CFIUS accountability measures is both urgent and necessary to maintain FDI in the United States which is vital to economic growth and prosperity. Lack of accountability measures and transparency leaves CFIUS vulnerable to being used for political gain instead of for its primary purpose of maintaining national security.[4] For example, consider the recent public spectacle of CFIUS's investigation in Nippon Steel's takeover of U.S. Steel.[5] There was very little published information about why there would be a national security threat; however, there was significant information published signaling a political upside to blocking the transaction.[6] America witnessed the lack of transparency front and center. Under the new Trump Administration, which is likely to have isolationist preferences, CFIUS could become a tool to cordon off the United States from the rest of the world, and under the current scheme, there is little the other branches can do to curb that power.

This paper explores how CFIUS's structure and the legislature's expansive delegation of authority to the Committee has created an administrative scheme that lacks proper accountability mechanisms to prevent extensive overreach in FDI. Part I provides a historical overview of the development of CFIUS and an explanation of the current legislative framework that CFIUS operates under. Part II evaluates the failures of the CFIUS legislation to implement meaningful accountability mechanisms. Finally, Part III proposes some possible steps forward, including increased legislative oversight and possible legal challenges to CFIUS action, followed by a brief conclusion.

I. OVERVIEW OF CFIUS HISTORICAL DEVELOPMENT

The Committee on Foreign Investment in the United States (CFIUS) is an inter-agency committee housed in the Department of the Treasury and comprised of cabinet members and administrative department heads including the Treasury Secretary (who serves as the chair of the Committee), Secretary of State, Secretary of Defense, Secretary of Homeland Security, Secretary of Commerce, Secretary of Energy, the Attorney General, the President's National Security Advisor, the U.S. Trade Representative, and the Director of the Office of Science and Technology Policy.[7] In addition to these permanent members of the Committee, the President may assign heads of other executive departments and agencies to CFIUS on a case-by-case basis.[8] There are also official observers of the CFIUS

4. *See* Alan Rappeport, *Furor Over U.S. Steel Bid Pits Secretive Government Panel in Spotlight*, New York Times (May 3, 2024), https://www.nytimes.com/2024/05/03/us/politics/us-steel-nippon-steel-biden-cfius.html. [https://perma.cc/99F7-9N5X]

5. *See id.*

6. *See id.*

7. *See* Regulations Pertaining to Mergers, Acquisitions, and Takeovers by Foreign Persons, 73 Fed. Reg. 70,702 (Nov. 21, 2008); *See also* CATHLEEN D. CIMINO-ISAACS & KAREN M. SUTTER, CONG. RSCH. SERV., IF10177, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1 (2024).

8. *See* Fed. Reg., *supra* note 7, at 70,702.

process, such as the Director of the Office of Management and Budget, who can participate as appropriate and report to the President on the CFIUS process.[9]

Created in the 1970s by an executive order during the Ford Administration, CFIUS was tasked with gathering information on foreign investments in United States companies.[10] The Committee was created as a direct response to Congressional concern that FDI monitoring was lacking and fear that the Organization of the Petroleum Exporting Countries (OPEC) would use surpluses from its oil embargo on the United States to buy critical American corporations.[11] While CFIUS was initially created by executive order, it was later officially recognized by Congress in an amendment to the Defense Production Act of 1950 which expressly granted the executive branch authority to investigate mergers and acquisitions involving foreign investment for national security purposes.[12] The history of CFIUS development is a story about American fear of foreign investors with nefarious intentions. The following sections detail the amendments and legislation that have shaped CFIUS into the far-reaching authority it has become.

A. EXON-FLORIO AND BYRD AMENDMENTS INCREASE CFIUS POWER

CFIUS really got its teeth in 1988. Until the passage of the Exon-Florio Amendment to the Defense Production Act, CFIUS was simply an investigatory body.[13] However, in the late 1980s there were concerns over foreign acquisitions, particularly by Japanese investment in technology companies, that led Congress to pass the Exon-Florio Amendment which allows the President to block foreign acquisitions of "persons engaged in interstate commerce in the United States" that threaten national security.[14] The President is to take what action he considers "appropriate" to suspend or prohibit these transactions but the President is only expected to engage this power if other U.S. laws are inadequate or inappropriate to protect national security in the case at hand.[15] The authority to administer the Exon-Florio provision was delegated to CFIUS.[16] It is important to note that Congress did not define national security in order to allow for CFIUS to employ a broad interpretation that allows for them to exercise authority over numerous industries.[17]

Congress also designated a list of factors for the President to consider when deciding whether to block a transaction including consideration of national

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9. *See id.*

10. *See* Jingli Jiang & Gen Li, *CFIUS: For National Security Investigation or For Political Scrutiny?*, 9 TEX. J. OIL GAS & ENERGY L. 67, 70 (2013).

11. *See* Jayden R. Barrington, *CFIUS Reform: Fear and FIRRMA, an Inefficient and Insufficient Expansion of Foreign Direct Investment Oversight*, 21 TRANSACTIONS: TENN. J. BUS. L. 77, 89 (Fall 2019).

12. Defense Production Act of 1950, 50 U.S.C. app § 2170 (1950) (Currently 50 U.S.C. §4565 (2018)).

13. *See* Jiang & Li, *supra* note 10, at 70.

14. JAMES K. JACKSON, CONG. RSCH. SERV., RL33312, THE EXON-FLORIO NATIONAL SECURITY TEST FOR FOREIGN INVESTMENT 2 (2006).

15. *Id.* at 3.

16. *Id.*

17. *Id.* at 2.

defense requirements, whether industry control by a foreign entity would prevent the U.S. from meeting national security requirements, potential of transactions on the sale of military goods to countries that support terrorism or will use the technology to develop missile technology or chemical and biological weapons, and the potential effects on American technological leadership regarding national security.[18] Under Exon-Florio, the Treasury Department issued final regulations that implemented a voluntary notification system by the parties involved in a transaction covered by CFIUS jurisdiction.[19] However, parties that choose not to notify are still subject indefinitely to CFIUS review and appropriate action by the President. Therefore, many choose to engage in this process.[20]

The legislature further empowered CFIUS by passing the Byrd Amendment in 1992.[21] The Byrd Amendment provided requirements for when CFIUS *must* investigate proposed mergers, acquisitions, or takeovers.[22] The Committee must investigate where "(1) the acquirer is controlled by or acting on behalf of a foreign government; and (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States."[23]

B. CFIUS UNDER FINSA

The traditional CFIUS process of notice, review, investigation, and presidential review was codified in the Foreign Investment and National Security Act of 2007 (FINSA), passed after CNOOC's failed acquisition of Unocal Corporation.[24] Under FINSA, companies voluntarily notify CFIUS or the agency provides notice by requesting the parties provide information to determine if it is a covered transaction.[25] It would be considered a covered transaction if the transaction results in control of a U.S. business by a foreign person, but the definition of transactions excludes many nontraditional forms of investment, such as start-up companies.[26] There is also a safe harbor provision built into the legislation that designates what is not considered "control" of a U.S. business.[27]

FINSA expanded CFIUS jurisdiction to include homeland security effects in the definition of national security and to include critical base infrastructures in the definition of "covered transaction.[28] Additionally, FINSA provides statutory authority for CFIUS to enter into mitigation agreements or to impose conditions

18. *See id.* at 3-4.
19. *See id.* at 4.
20. *See id.*
21. *See id.* at 3.
22. *See id.*
23. *See id.*
24. *See id* at 70.
25. *See id.* at 73.
26. *See id.* at 77.
27. *See id.* at 78.
28. *See id.* at 71.

on the transaction to address national security risks.[29] FINSA also expanded the list of elements for CFIUS to consider in its national security risk analysis allowing for the consideration of indirect factors, such as potential military use of the technology.[30]

The CFIUS process under FINSA is extremely fast-paced, totaling only 90 days.[31] After notice is given, a 30 day review period begins to determine whether it is a covered transaction and if there are national security implications.[32] During these 30 days, the Committee can request that the parties clarifyquestions regarding the transaction.[33] Following every review period Congress should receive a review report.[34] If the Committee believes further investigation is necessary, CFIUS sends written notice that they will begin a 45-day investigation period.[35] During this period the applicants can enter into mitigation agreements that would allow the transaction to pass CFIUS review.[36] If the Committee does not forward the investigation to the President for a decision at the end of this stage they send an investigation report to Congress with their results.[37] The Committee only requests a decision from the President if they believe the President should suspend the transaction, the Committee is unable to come to a decision regarding the transaction, or the Committee requests that the President make a determination regarding the transactions.[38] If the decision is forwarded to the President, they have 15 days after receiving the investigation report to make a public announcement regarding the fate of the transaction.[39] FINSA specifies that, "The actions of the President. . .and the findings of the President. . .shall not be subject to judicial review."[40]

C. MODERN ERA CFIUS: EXPANSIVE AUTHORITY UNDER FIRRMA

In 2018, the Trump Administration adopted the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA), which is the current legislation under which CFIUS operates.[41] FIRRMA greatly expanded the jurisdiction of CFIUS due to increased concerns about the protection of U.S. intellectual property

29. *See id.*
30. *Id.* at 71.
31. *See generally id.*
32. *See id.* at 74.
33. *Id.* at 75.
34. *Id.*
35. *Id.*
36. *Id.*
37. *See id.*
38. *Id.* at 75-76.
39. *See id.* at 76.
40. Foreign Investment and National Security Act of 2007, 50 U.S.C. §6.
41. *See* JAMES K. JACKSON, CONG. RSCH. SERV., RL33388, THE COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES 1 (2020); *see also* Barrington, *supra* note 11, at 84.

and cybersecurity from Chinese and Russian influence.[42] FIRRMA alters CFIUS legislation in three major ways: procedure and review structure, changes to judicial review, and increased jurisdictional scope.[43]

Before FIRRMA, CFIUS notifications were voluntarily submitted by entities and investors involved in transactions or the process was started via agency notice.[44] FIRRMA added a new mandatory declaration process for covered transactions where a foreign government is acquiring a "substantial interest" in certain U.S. businesses, specifically U.S. businesses involved with critical technologies, critical infrastructure, or sensitive personal data.[45] In addition, FIRRMA also extended the number of days for several stages of review and implemented filing fees.[46] However, the most important procedural change enacted by FIRRMA is an added provision that permits the Committee to suspend a transaction on their own, instead of solely designating that authority to the President.[47]

CFIUS also experienced a significant expansion in jurisdictional scope under the new legislation.[48] Instead of focusing on whether a foreign entity gained "control" in determining whether CFIUS can review a transaction, the analysis now simply turns on whether a foreign entity will acquire influence.[49] This is a greatly reduced bar that provides CFIUS with jurisdiction over nearly all completed mergers, acquisitions, and joint ventures involving any foreign entity.[50] This expanded jurisdiction applies to non-controlling investments in U.S. businesses working in critical technologies, critical infrastructure, or maintaining or collecting sensitive personal data.[51] Both "critical technologies" and U.S. companies with access to sensitive personal data are new categories of CFIUS jurisdiction, joint ventures are now considered a "transaction" under FIRRMA, and there is explicit inclusion of review for certain real estate transactions in close proximity to a military installation or U.S. government facility or property of national security sensitivities.[52]

These expanded areas were later defined by the Treasury Department. Critical technologies are defined to "include certain items subject to export controls and other existing regulatory schemes, as well as emerging foundational technologies controlled pursuant to the Export Control Reform Act of 2018."[53] Critical infrastructure includes sectors such as telecommunication, utilities, energy, and

42. *See* Barrington, *supra* note 11, at 103-05.

43. *See id*. at 106.

44. *See* Jiang & Lee, *supra* note 10, at 73.

45. U.S. Dept. of the Treas. Office of Public Affairs, Fact Sheet: Final CFIUS Regulations Implementing FIRRMA 2 (2020).

46. *See* Barrington, *supra* note 11, at 107.

47. *See id*. at 107-08.

48. *See id*. at 106.

49. *See id*. at 107.

50. *Id*. at 106-07.

51. *See* U.S. Dept. of the Treas. Office of Public Affairs, *supra* note 45, at 2.

52. *See* Barrington, *supra* note 11, at 107; *see also* U.S. Dept. of the Treas. Office of Public Affairs, *supra* note 45, at 2-3; *see also* James K. Jackson, *supra* note 41, at 2.

53. U.S. Dept. of the Treas. Office of Public Affairs, *supra* note 45, at 3.

transportation.[54] Sensitive personal data includes ten different categories including but not limited to financial information, geolocation, and health data.[55]

While Presidential actions are still unreviewable by the courts, FIRRMA provides that civil actions must be brought in the United States Court of Appeals for the District of Columbia Circuit.[56] However, since the passage of FIRRMA there have been no judicial challenges filed.

II. CFIUS LACKS ACCOUNTABILITY MEASURES

There are multiple failures in CFIUS accountability that create large-scale issues for foreign investors. Given that judicial challenges have been rendered ineffective, there is a prevention of proper judicial oversight over the administrative agency. There is also an overall lack of transparency and agency explanation for decisions due to the confidential nature of the proceedings and emphasis on national security. This lack of information sharing makes it difficult for future investors to manage the CFIUS process and prevents the public from obtaining information about CFIUS proceedings and outcomes.

A. JUDICIAL CHALLENGES ARE INEFFECTIVE

CFIUS legislation provides a very limited right to judicial review that fails to adequately protect entities that are attempting to engage in covered transactions. While actions of the Committee are reviewable, that does not help covered entities in the CFIUS context. "Final agency action," as it is traditionally understood in the administrative context, occurs only when the President blocks a transaction and judicial review of Presidential actions is barred by FINSA.[57] However, in 2014 the D.C. Circuit released its only CFIUS decision, *Ralls Corp. v. CFIUS*, which seemed to provide a plausible path to judicial review.[58] The Court stated that FINSA did not bar challenges to Presidential actions on constitutional grounds.[59] Unfortunately, *Ralls Corp.* still fails to provide a meaningful judicial review to ensure that CFIUS acts in a non-arbitrary manner in their investigations and recommendations to the President.

1. INEFFECTIVENESS OF AGENCY CHALLENGES WITHIN CFIUS FRAMEWORK

The CFIUS framework creates a landscape in which judicial challenge of agency action is virtually pointless and is most certainly not worth the legal fees and resources that would be necessary for the corporations interested in the transaction to bring the suit. While FIRRMA explicitly addresses that suits can be

54. *See id.*
55. *See id.*
56. *See* Barrington, *supra* note 11, at 108.
57. *See id.* at 133; *see also* Foreign Investment and National Security Act of 2007, 50 U.S.C. § 6
58. *See generally Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296 (D.C. Cir. 2014).
59. *See Ralls Corp.*, 758 F.3d at 311.

brought in the United States Court of Appeals for the District of Columbia, this simply creates the illusion that judicial review is a viable accountability mechanism to restrict CFIUS action.[60] The reason that judicial review of CFIUS orders is not effective is simple: CFIUS does not make the final decision. It is surely possible for a corporation to challenge CFIUS orders that halt a transaction or force engagement in mitigation; but if CFIUS believes that the transaction is a national security threat they will make a recommendation to the President that the transaction be blocked. The President then has the final say, making a challenge of the CFIUS order a moot point.[61] In fact, the district court in *Ralls Corp*. came to that conclusion and dismissed Ralls Corporation's claims about the CFIUS order as moot because there had already been a Presidential order issued in the case.[62] The power and attractiveness of this judicial challenge was not even strengthened when, under FIRRMA, CFIUS was given the ability to temporarily block transactions. Even if corporations were to succeed in a judicial challenge of the temporary stoppage of the transaction they would still have to contend with Presidential review and would have no judicial recourse if the outcome of this review was unfavorable to them.

Essentially, all CFIUS roads lead to the President, and Presidential action has been sufficiently shielded from judicial review.[63] Just as entities wait to challenge final agency action in other administrative contexts it would make sense to do the same thing here. However, CFIUS is only the final determiner if they decide that there are no national security implications and provide safe-haven for the transaction to be finalized, in which case parties to a transaction would have no reason to seek judicial review. Judicial review is a meaningful check to administrative agencies, but for it to be effective there must be recourse that allows parties to believe that a challenge would be meaningful and could rectify any possible arbitrariness on behalf of the agency. In this context, challenge of agency action has neither of these components. Thus, while it may appear to be a possible avenue for restriction the court has no true power to restrain CFIUS action.[64]

2. Limitations of Constitutional Challenges to Presidential Action

Ralls Corp. is the first and only case to challenge a CFIUS order and the subsequent Presidential Order.[65] Ralls is a domestic corporation owned by two Chinese

60. *See* Barrington, *supra* note 11, at 133.

61. *See id*. at 133-34.

62. *See Ralls Corp*., 758 F.3d at 302.

63. *See* Michael E. Leiter et al., *U.S. Finalizes CFIUS Reform: What It Means for Dealmakers and Foreign Investment*, Skadden, Arps, Slate, Meagher, & Flom LLP (Aug. 6, 2018), https://www.skadden.com/-/media/files/publications/2018/08/us-finalizes-cfius-reform/usfinalizescfiusreformwhatitmeansfordealmakersandf.pdf [https://perma.cc/UFK3-J2D8].

64. *See* Barrington, *supra* note 11, at 133.

65. *See* Business Litigation Reports, *July 2019: Legal Challenges to CFIUS Reviews,* Quinn, Emanuel, Urquhart, & Sullivan LLP (July 30, 2019), https://www.quinnemanuel.com/the-firm/publications/article-july-2019-legal-challenges-to-cfius-reviews/ [https://perma.cc/E6TX-7BV4].

nationals who are also CFO and Vice President of the Sany Group, a Chinese heavy machinery manufacture company.[66] In March 2012, Ralls purchased four American limited liability companies that were used for developing windfarms in Oregon.[67] The windfarms were located near or within a Navy restricted airspace and bombing zone.[68] In June 2012 they submitted a voluntary notice to CFIUS, CFIUS launched an investigation in July 2012, and in August 2012 CFIUS issued an order with required mitigation measures.[69] In September, President Obama issued a Presidential Order regarding the transaction, stating that it was a national security risk, that the transaction was prohibited, and Ralls should divest all interest in the companies along with other mitigation measures.[70] Ralls then filed suit against both CFIUS and the President alleging that CFIUS exceeded its statutory authority and the Orders violated Rall's due process rights under the Fifth Amendment of the Constitution and Rall's equal protection rights.[71] The DC Circuit Court ruled that Congress did not intend for the bar on judicial review to preclude judicial review of constitutional challenges, the political question doctrine did not bar the court from determining whether the Due Process Clause entitled the corporation to have notice of and access to evidence the President utilized in making his decision and have the opportunity to respond before he reaches his determination, and that Ralls' protected property interest was deprived without due process of law.[72]

The Circuit Court opened the door to welcome constitutional challenges to Presidential Orders relating to CFIUS investigations, but this avenue is limited in two major aspects: Almost all CFIUS investigations do not lead to Presidential action,[73] and it requires that the transacting parties have a constitutional claim. As mentioned previously, there were 233 notices in 2023 that were determined to be covered transactions and not a single one led to the issuance of a Presidential decision.[74] However, there were 14 transactions that were withdrawn for commercial

66. *See* Chang Liu, *Ralls v. CFIUS: The Long Time Coming Judicial Protection of Foreign Investors' Constitutional Rights against Government's National Security Review*, 15 J. INT'L BUS & L. 361, 369 (2016).

67. *Ralls Corp.,* 758 F.3d at 301.

68. Liu, *supra* note 66, at 369.

69. *See id*. at 370.

70. *See id.*

71. *See id*.

72. *See generally Ralls Corp*., 758 F.3d.

73. *See* Jackson, *supra* note 40, at 23 (stating that there have been only five instances in which transactions were blocked by the President based on a CFIUS recommendation). The other four transactions were President Bush's order that the China National Aero-Technology Import and Export Corporation divest its acquisition of MAMCO Manufacturing in 1990, President Obama's order blocking Fujian Grand Chip Investment Fund from acquiring Aixtron in 2016, President Trump's order blocking the acquisition of Lattice Semiconductor Corp. by a Chinese investment firm in 2017, and President Trump's order blocking the acquisition of Qualcomm by Broadcom. Given that CFIUS has existed since the 1970s and four of the five Presidential orders occurred in the last 25 years, it is conceivable that Presidents are more aggressively engaging with their ability to block these transactions and that CFIUS is more aggressively pursuing foreign investment investigations and providing more recommendations to the President in recent years. The increased reliance on CFIUS makes the need for accountability mechanisms even more pressing.

74. *See* CFIUS Ann. Rep. to Cong., *supra* note 2, at 14.

reasons or after CFIUS informed the parties that there were no mitigation measures that would resolve the national security measures, or after the parties chose not to accept the proposed mitigation measures.[75] The CFIUS process had negative implications for the parties and because the process never involved a Presidential decision, there was no opportunity for the parties to the transaction to challenge. The infrequency of Presidential action to CFIUS recommendations leaves the *Ralls Corp*. avenue open to so few parties that it cannot be viewed as a reasonable accountability mechanism.

Additionally, it is difficult for investors in the CFIUS context to develop feasible constitutional due process claims. An important factual point in *Ralls Corp*. was that while the transaction did fall under CFIUS jurisdiction because of the nationality of its investors, Ralls was an American corporation. Therefore, it maintained almost all of the constitutional rights afforded to a U.S. citizen, including due process.[76] The Fifth Amendment's Due Process Clause provides that, "no person shall. . .be deprived of life, liberty, or property without due process of law."[77] Due to the language in the Fifth Amendment that protects all "persons," the Due Process Clause is typically applied equally across both citizens and non-citizens,[78] so foreign investors and entities would not necessarily be barred from bringing a due process claim. However, this is not the only hurdle these claims must jump over.

The first inquiry in a due process claim is whether the plaintiff has been deprived of a protected property or liberty interest.[79] Ralls acquired a recognized property interest when it acquired 100% ownership over the project companies and their assets.[80] Many other parties to covered transactions will run into issues satisfying this requirement. While CFIUS has the ability to complete retroactive reviews,[81] a majority of entities file voluntary notice before completing the transaction to avoid costly damages if it turns out they cannot survive CFIUS review. The fact that the transactions have not yet finalized would make it incredibly difficult for parties to show that they have a recognized property interest because the determination that there *was* a property interest in *Ralls Corp*. hinged on the fact that the transaction had already been completed.[82]

This issue presents a Catch-22 for parties attempting to complete these transactions. If they do not complete the transaction before filing for CFIUS review they may bar themselves from bringing one of the only judicial challenges available to

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75. *Id.*

76. *See* Adam Winkler, *The Long History of Corporate Rights*, 98 B.U. L. REV. ONLINE 64, 64 (2018).

77. U.S. Const. amend. V.

78. David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2003).

79. *See Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 315 (D.C. Cir. 2014).

80. *See id.*

81. *See* Jiang & Lee, *supra* note 10, at 74.

82. *See Ralls Corp.*, 758 F.3d at 315.

them. However, if they complete the transaction before filing, they would be taking an incredible risk if CFIUS believes the transaction to have insurmountable national security risks and forces the parties to divest and incur financial losses.

B. ABSENCE OF TRANSPARENCY AND AGENCY EXPLANATION

A major component of Ralls' due process claim was the fact that the government did not provide any information about how and why they came to the outcome that the transaction could not be maintained and Ralls needed that information in order to have a meaningful opportunity to respond to both CFIUS and the President.[83] To remedy the due process issues the court required that the government provide all unclassified information about why it reached its determination.[84] It would seem that the natural response to the *Ralls Corp*. decision would be an increase in agency transparency so that they can avoid future judicial challenges. However, it is more likely that this decision by the court will create less transparency because it provides an incentive for the government to classify more documents.[85] Article II designates foreign policy exclusively to the executive branch,[86] so there is a strong presumption against judicial review on these matters. CFIUS already has such an unimpaired ability to define national security that it could essentially have an open mandate to classify everything in a CFIUS proceeding involving a transaction that they believe presents a threat to national security.

This lack of explanation also creates an arbitrariness issue. Under the Administrative Procedure Act (APA), an agency cannot act in a manner that is considered arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[87] This arbitrary and capricious standard is administered by the court which looks to see if the agency looked at all of the relevant data and provided a satisfactory explanation.[88] By this standard, CFIUS could not possibly meet the required bar given that most of the time CFIUS does not provide any explanation at all either to the companies or the public.[89] Ralls failed in their claim that the CFIUS order violated the APA but not because the court ruled that CFIUS did not act arbitrarily and capriciously. The Court ruled that CFIUS evaded review because the timeline between when the CFIUS order in the case was issued and when it was revoked was much too short for judicial review.[90]

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83. *See* Christopher M. Fitzpatrick, *Where Ralls Went Wrong: CFIUS, The Courts, and the Balance of Liberty and Security*, 101 CORNELL L. REV. 1087, 1095 (2016).

84. *See id*. at 1106.

85. *See id*.

86. *See* U.S. Const. art. II §2.

87. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

88. Jonathan M. Gaffney, Cong, Rsch. Serv., LSB10558, Judicial Review Under the Administrative Procedure Act (2024).

89. *See* Jill Priluck, *The Mysterious Agency That Can Block a Global Merger,* Reuters (July 8, 2013), https://www.reuters.com/article/idUS37319485520130708/ [https://perma.cc/P74D-2SVD].

90. *See* Ralls Corp. v. Comm. on Foreign Inv. in the U.S., 758 F.3d 296, 323 (D.C. Cir. 2014).

They ruled that Ralls satisfied the capable-of-repetition-yet-evading-review exception to mootness[91] and sent the case back to the District Court who ordered the release of unclassified materials relating to CFIUS's recommendation to the President.[92] The Court believed the release of these materials would solve the arbitrary and capricious issue in this case. If CFIUS does not repeat this practice and instead continues to withhold materials and explanations, they could continue to be in violation of the APA which acts as the primary regulatory mechanism for administrative agencies. Further, without a meaningful judicial challenge the courts have no way to enforce this standard within the CFIUS system.

III. STEPS FORWARD: HOW TO LIMIT CFIUS'S EXPANSIVE POWER

Many scholars have asserted that the bounds of CFIUS do not go far enough and that CFIUS does not have enough power to sufficiently protect national security interests in our country.[93] I would argue, along with others, that while ensuring national security interests is vital to the protection of American citizens, so is promoting and fostering FDI.[94] Additionally, potential tangential relations to national security should not be a reason to forego all accountability measures other administrative agencies are held to. In order to prevent national security interests from overwhelming those related to economic development both legislative reform and increased judicial challenge of CFIUS action can provide means to curb the power amassed by CFIUS in recent years.

A. LEGISLATIVE REFORM

The recent issues regarding TikTok, a popular social media app used in the United States, and Congressional involvement in what has largely been seen as CFIUS failure has created an environment in which legislative reform to the CFIUS process might be well-received. TikTok came under CFIUS purview when a Chinese technology company called ByteDance acquired it in 2017.[95] CFIUS unanimously recommended that the deal be blocked and ordered ByteDance to divest all interests and data obtained from users in the United States, but the acquisition went through and President Trump's executive order attempting to force divesture has largely been caught up in court battles since 2019.[96] CFIUS failed to engage in review in a timely manner, their unfettered ability to engage in mitigation proceedings went awry, and they eventually

91. *See id*. at 325.

92. *See* Christopher M. Fitzpatrick, *supra* note 83, at 1095.

93. *See* Barrington, *supra* note 11, at 141.

94. *See generally* Matthew R. Byrne, *Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance*, 67 Ohio St. L.J. 849 (2006).

95. *See* Courtney Fingar, *Congress' TikTok Bill Tries to Fix What CFIUS Failed To Do Years Ago*, Forbes (March 19, 2024), https://www.forbes.com/sites/courtneyfingar/2024/03/19/with-tiktok-ban-congress-tries-to-do-what-cfius-could-not/ [https://perma.cc/JCW3-KMXX].

96. *See id*.

stopped engaging with TikTok and ByteDance altogether and failed to provide substantive response as to why that was the case.[97] Congress has taken action and passed a bill, signed into law by President Biden, forcing TikTok's parent company to sell or face a ban.[98] This bill was recently upheld by the United States Supreme Court in *Tik Tok Inc. v. Garland*.[99] Congress is essentially stepping in to enforce what CFIUS failed to accomplish through mitigation agreements demonstrating that many legislators on Capitol Hill are dubious about the CFIUS process and eager to make adjustments.

Since the implementation of the Exon-Florio Amendment there have been suggestions from the Government Accountability Office (GAO) and Congress members on ways to change the CFIUS process. I believe some of these suggestions could either directly increase the accountability of the committee or they could indirectly increase accountability by opening the door for traditional mechanisms to be more effective. The GAO has suggested extending the time allowed for the review process by statute.[100] This would be an effective reform because it would provide the opportunity for increased communication between the companies/investors and the Committee. An increase in communication could correlate with increases in transparency. Additionally, extending the time allowed for the review process would make it easier for companies and investors to utilize judicial review to the fullest extent. They could petition the court without having their challenge mooted because the process had already moved on before they had the chance to file the original motion. When it comes to the CFIUS process, more time is beneficial because it creates greater opportunities for transparency and accountability in both judicial courts and the court of public opinion.

One of the most heavily suggested reforms by Congress that has never been fully brought to fruition is increased reporting requirements.[101] This would be crucial to creating greater transparency by CFIUS and requiring Congress to take a more active oversight role. Currently CFIUS provides annual reports to Congress but with the ever-increasing reach of the definition of national security CFIUS is reviewing more transactions than ever before. It could be beneficial to

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97. *See* Drew Harwell, *TikTok Offered an Extraordinary Deal. The U.S. Government Took a Pass.*, WASH. POST (May 29, 2024), https://www.washingtonpost.com/technology/2024/05/29/tiktok-cfius-proposal-rejected/ [https://perma.cc/M7JZ-GBXU]

98. *See* Haleluya Hadero, *Senate Passes Bill Forcing TikTok's Parent Company to Sell or Face Ban, Sends to Biden for Signature*, AP News (April 23, 2024), https://apnews.com/article/tiktok-ban-congress-bill-1c48466df82f3684bd6eb21e61ebcb8d [https://perma.cc/ALN4-7SP3].

99. *See generally Tik Tok v. Garland*, 604 U.S. 24-656 (2025). Though related to a CFIUS investigation, this case solely decides the constitutionality of the congressional statute passed in response to CFIUS's failure to finalize an agreement with the parties. It does not at all implicate the CFIUS process. As of February 24, 2025, President Trump enacted a freeze on the enforcement of the statute by the Attorney General, allowing ByteDance and TikTok to continue operating in the United States without divesture of their interests. Further evaluation of the effectiveness of the statute will be required once the 75-day freeze is over, and the enforcement of the statute can be analyzed.

100. *See* Byrne, *supra* note 94, at 881.

101. *See id.* at 883-84.

increase the reporting requirements to semi-annual reports, as suggested by Representative Blunt.[102] Increasing the reporting requirements to semi-annual would ensure that less transactions got lost in the big picture because transactions could be analyzed in more detail instead of in one overarching review. These increased reporting requirements could also accomplish the goal of increasing transparency. These semi-annual reports should be made available to the public like the annual reports are, and I would argue that they should include more details about the transactions than are currently included. As much detail as is possible without endangering national security should be presented to Congress and in turn the public so that there is sufficient review of the CFIUS process. CFIUS is less likely to overreach on their authority if they know that there are consistently lots of eyes on their actions.

B. A NEW APPROACH TO JUDICIAL CHALLENGE

While the Supreme Court eventually upheld the congressional statute forcing ByteDance's divesture in its interests in TikTok, TikTok and ByteDance have shown that it is in fact possible to disrupt the CFIUS process through legal challenges demonstrating that a new approach to the judicial mechanism of accountability might prove effective. Lawyers representing companies in these matters have a duty to ensure that they represent their clients wishes to the fullest extent possible. To prevent abuse of power or a constitutional violation, legal professionals have an obligation to explore every option for judicial challenge in these matters to utilize judicial checks against executive overreach.

1. THE VALIDITY OF AN EQUAL PROTECTION CHALLENGE

As was discussed in Section III, one of the only avenues for judicial challenge is a constitutional challenge to presidential orders at the conclusion of a CFIUS case. Another option for the constitutional challenge that shows some promise is an equal protection challenge. The Fourteenth Amendment provides that no State can "deny to any person within its jurisdiction the equal protection of the laws."[103] This becomes a useful clause for CFIUS challengers because they could make the case that CFIUS and the President discriminated against them based on national origin by depriving the purchase of property without adequate notification.[104] This is especially true if the investor or company hails from a country that tends to have frequent run-ins with the Committee. For example, many investors and companies based in China would most likely have a stronger equal protection claim in the current climate because transactions related to investors and companies from China have received significant scrutiny. This sentiment is exemplified

102. *See id*. at 884.
103. U.S. Const. amend. XIV, §1, cl. 2.
104. *See* Liu, *supra* note 66, at 377.

by the TikTok case which gained not just attention from CFIUS and the executive but also from Congress.

Ralls failed on their equal protection claim and decided not to appeal but Ralls does not present the strongest case for an equal protection challenge. Since Ralls was not a foreign corporation, it did not have the best claim to discrimination on the basis of national origin.[105] If the corporation related to the transaction is foreign, they would still be covered under the equal protection clause and would have a stronger case for being considered a covered class. An equal protection challenge should be considered a viable addition to the constitutional challenges at the disposal of corporations and investors under CFIUS scrutiny and could experience success if brought under stronger circumstances than were present in *Ralls*.

2. THE IMPLICATIONS OF *LOPER BRIGHT*

The recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo* can potentially strengthen the argument that a corporation or investor could make about CFIUS acting in a manner that is arbitrary and capricious making these claims more viable than they have been in the past. CFIUS has been given a broad grant of authority which, under past judicial precedent, would provide them large latitude with which to make decisions without being questioned by the courts. *Loper Bright* struck down this notion as a violation of the APA because agencies cannot use ambiguities and broad grants of authority as loopholes around arbitrary and capricious requirements.[106] The Court established that there will be strict judicial oversight of agencies that have extremely broad authority to ensure that they do not act in ways that are arbitrary and capricious. This new scrutiny with which agencies will be evaluated brings a renewed strength to an arbitrary and capricious challenge of CFIUS decision making. Under this new line of reasoning, corporations and investors should be considering bringing these challenges because CFIUS will no longer be granted the benefit of the doubt simply because Congress has granted them significant leeway. *Loper Bright* has opened a path for the judiciary to strike down CFIUS's lack of (or absence of) information sharing and require that they increase their transparency by giving reasoned explanation to corporations and investors with transactions being investigated by the Committee if it is determined that they do present a credible national security threat.

CONCLUSION

This paper explains how CFIUS's legislative structure and expansive mandate has created a dangerous administrative agency that lacks necessary accountability

105. *See* Liu, *supra* note 66, at 379.

106. *See Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 410-11 (2024).

measures to prevent coercive and arbitrary practices. The failure of the built-in judicial review mechanisms is evidenced by the fact that only one corporation has ever tried to bring a challenge to CFIUS action. This is compounded by the fact that the foreign policy mandate of Article II creates a strong presumption against creating a stronger and more effective path to judicial review. Even further, this Committee acts in complete secrecy. The confidentiality clauses and veil of national security create a complete lack of transparency, and the Committee fails to explain to parties to the transaction why they make the recommendations that they do to the President. To remedy the blatant lack of accountability Congress should seek to reform CFIUS legislation by increasing reporting requirements and extending the statutory review period to provide greater opportunity for transparency between parties and utilization of judicial mechanisms. Additionally, legal counsel should bring additional challenges to CFIUS action and Presidential orders to create a body of case law that the judiciary can rely on when creating a standard for CFIUS review. The recent decision in *Loper Bright* as well as recent events involving both TikTok and U.S. Steel provide the perfect storm for CFIUS reform. Increasing public awareness, a willing legislature, and a watchful judiciary create the perfect opportunity to develop CFIUS into an agency that strikes the necessary balance between FDI and national security.